No. 15,749

IN THE

United States Court of Appeals

For the Ninth Circuit

MARIE GERMAINE ROSE ANNA BISAILLON,
Appellant,

vs.

WILLIAM A. HOGAN, District Director, Immigration and Naturalization Service, Honolulu,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

APPELLEE'S BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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APPELLEE'S BRIEF.

Appellee agrees with Appellant's statement of jurisdiction and statement of the case with a few minor reservations. The only disagreement would be with Appellant's argumentative statement concerning the contents of Exhibit 8 (Appellant's Br., p. 5).

QUESTIONS PRESENTED.

1. Were the convictions of the crimes for which Appellant was deported convictions of crimes involving moral turpitude?

2. Was Appellant given a fair hearing?

SUMMARY OF ARGUMENT.

Appellant's two crimes both involve moral turpitude. They both involve fraud and are akin to perjury. Appellant's hearing was a fair hearing in that she waived her statutory right to counsel (8 USC § 1252(b)(2)). Her stubborn insistence on disqualified counsel avails her nothing when the record shows she was apprised of his disqualification by the Board of Immigration Appeals (Ex. 8; Ex. A). No prejudice resulted to Appellee's case from her failure to select anyone but a disqualified attorney.

ARGUMENT.

I.

SECTION 1542, TITLE 18, UNITED STATES CODE, INVOLVES MORAL TURPITUDE.

The section provides *in part* as follows:

> Whoever *willfully and knowingly makes any false statement* in an application for a passport *with intent to induce and secure the issuance of a passport* under the authority of the United States, either for his own use or the use of another *contrary to the laws regulating the issuance of passports* or the rules prescribed pursuant to such laws, * * *. (Emphasis added).

To begin with, the portion of the statute above cited is the portion under wihch Appellant was charged. (Ex. 8, pp. 11-13; Ex. A, sub ex 5 and 6*).

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*For the purpose of clarity and continuity, the designation "Sub ex" carries the same connotation as in Appellant's Brief (Brief 2 note *).

This particular portion of the statute is akin to perjury. Perjury is a crime involving moral turpitude. *Kaneda v. U.S.,* 9 Cir. 1922, 278 Fed. 694; *Masaichi Ono v. Carr,* 9 Cir. 1932, 56 F.(2d) 772, 774; *U.S. v. Schlotfeldt,* 7 Cir. 1940, 109 F.(2d) 106; *U.S. v. Karnuth,* DC WDNY 1933, 2 F.Supp. 998, c.f. *U.S. v. Uhl,* 2 Cir. 1934, 70 F.(2d) 792, cert. denied 293 U.S. 573, 55 S.Ct. 85. However, describing the offense as set out in the statute with particular emphasis on the fraud aspects of the statute, we are reduced to the simple problem: is fraud an essential element of the offense? The Appellee's contention is that it is fraud. The attention of this Court is drawn to the reasoning of the Court in *U.S. ex rel Popoff v. Reimer,* 2 Cir. 1935, 79 F.(2d) 513, 515.

> The statute creates two crimes: (1) Knowingly aiding a person not entitled thereto to apply for or secure naturalization or to file preliminary papers; and (2) in such a proceeding knowingly procuring or giving false testimony or a false affidavit. The judgment of conviction shows that the former offense was the one committed, and that the appellant aided the applicant by making false statements regarding the applicant's name and entry. We may not assume that the false statements were made under oath; and without an oath there can be no perjury. Were perjury charged, there could be no doubt that the crime involved moral turpitude. United States ex rel. Karpay v. Uhl, 70 F. (2d) 792 (C.C.A.2). Although the appellant's crime did not involve perjury, it necessarily involved aiding the applicant to commit a fraud upon the government and giving such aid knowingly. Criminal frauds with respect to property

> have universally, so far as we are advised, been deemed to involve moral turpitude. United States ex rel. Medich v. Burmaster, 24 F.(2d) 57 (C.C.A.8); United States ex rel. Millard v. Tuttle, 46 F.(2d) 342 (D.C. La.); Ponzi v. Ward, 7 F. Supp. 736 (D.C. Mass.). That the fraud relates to obtaining rights of citizenship rather than to property does not, we think, make it any the less contrary to community standards of honesty and good morals. In our opinion the inherent nature of the offense of fraudulently aiding an alien not entitled to naturalization to apply for or obtain citizenship involves the moral turpitude requisite for deportation. Compare In re O'Connell, 184 Cal. 584, 194 P. 1010; In re Hofstede, 31 Idaho, 448, 173 P. 1087; In re Peters, 73 Mont. 284, 235 P. 772.

Although the statute here involved is not the same, it is nevertheless quite parallel—the statute charges an obvious fraud against the United States. "* * * It can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American Courts have, without exception, included such crimes within the scope of moral turpitude." *Jordan v. DeGeorge,* 1951, 341 U.S. 223, 229.

This Court, as Appellant is forced to concede, has settled one issue involved herein: That is, that the Immigration officials and the reviewing Court may examine the record of conviction; that is, the charge (indictment); plea, verdict, and sentence because "it is the specific criminal charge of which the alien was found guilty and for which he is sentenced that conditions his deportation, provided it involves moral tur-

pitude. * * *'' Quoted from *U.S. ex rel Zoffarano v. Corsi,* 2 Cir. 1933, 63 F.(2d) 757, 759, with approval. *Tseung Chu v. Cornell,* 9 Cir. 1957, 247 F.(2d) 929, 936.

Appellant contends further, *Tseung Chu v. Cornell, supra,* also settles the issue presented in Appellant's argument I (Br. 11-16), in that Appellant's argument seems to be that where any portion of the statute does not involve moral turpitude (which is not conceded by Appellee), then you may look no further than the statute. The argument is then that if any possible offense under the statute does not involve moral turpitude the reviewing Court's work is done. This quite apparently is not the holding in *Tseung Chu v. Cornell, supra,* since there would be no reason to look at the record of conviction if this were true. See also *U.S. ex rel Zoffarano v. Corsi,* 2 Cir. 1933, 63 F.(2d) 757, 759; *U.S. ex rel Giglio v. Neeley,* 7 Cir. 1953, 208 F.(2d) 327; *U.S. ex rel Berlandi v. Reimer,* 2 Cir. 1940, 113 F.(2d) 429; *U.S. ex rel Guarino v. Uhl,* 2 Cir. 1939, 107 F.(2d) 399, 400; *U.S. ex rel Popoff v. Reimer,* 2 Cir. 1935, 79 F.(2d) 513 (Appellant's Br. 23).

However, one argument made in Appellant's Brief concerning whether the statute involved fraud should be answered (Appellant's Br. 15). Appellant cites *Bridges v. U.S.,* 346 U.S. 209 (1953) as an analogous case showing that fraud is not a necessary element of the offense therein considered (18 USC § 1015). The Court states at page 222, ''* * * The offense there charged is that Bridges knowingly made a false ma-

terial statement in a naturalization proceeding. In that offense, as in the *comparable offense of perjury,* fraud is not an essential ingredient. The offense is complete without proof of fraud, although fraud often accompanies it. * * *'' (Emphasis supplied). Appellee has contended that this offense is comparable to perjury—a crime involving moral turpitude. Secondly, it will be noted that to constitute an offense this statute requires the additional element, ''* * * with intent to induce and secure the issuance of a passport * * * contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws.'' (In part 18 USC § 1542). The completed offense requires more than false statements alone. Appellee contends that the additional elements make fraud a necessary part of the offense which makes the offense one involving moral turpitude. *Jordan v. DeGeorge, supra.* Further, in *Bridges v. U.S., supra,* pages 220-221, the Court held the Wartime Suspension of Limitations Act (18 USC § 3287) covers offenses defrauding the United States in a pecuniary manner and hence would not concern this type of fraud at any rate.

Further, *U.S. v. Shoso Nii,* 96 F.Supp. 973, merely narrows the scope of the Wartime Suspension of Limitations Act (18 USC § 3287) to offenses in which *fraud is named as an element*—because of the policy of repose rather than whether fraud is an actual necessary ingredient to the offense as charged. Compare *U.S. ex rel Popoff v. Reimer,* 79 F.(2d) 513, 515. *Tseung Chu v. Cornell,* 249 F.(2d) 929, 936, note 6.

Appellant contends that the thorough discussion of moral turpitude contained in *Tseung Chu v. Cornell, supra,* covers the field and it is our contention that the specific violations with which Appellant was charged and convicted plainly involved moral turpitude.

II.

APPELLANT RECEIVED A FAIR HEARING.

Appellant's contentions concerning the hearing are twofold. "(A) She was denied her right to counsel (B) and the Record of the hearing on which the District Court's Finding is based is incomplete." (Appellant's Br., p. 18).

(A) Denial of counsel.

Appellant has a privilege of being represented by counsel of her choice, authorized to practice before the Immigration Service at no expense to the Government. (8 USC § 1252(b) (Appellant's Br. 8-9).

But also the Appellant has the right or privilege to proceed without counsel. Appellant has made two statements with which Appellee takes issue. They are as follows: "The major portion of Exhibit 8 is denoted to the matter of her not having counsel and clearly reflects how she was pressured into consenting to proceed with the hearing without counsel." (Appellant's Br., p. 5). And, "A reading of the transcript of the deportation hearing clearly reflects that Appel-

lant insisted on being represented by counsel of her choice, but that when she saw they were going ahead with the hearing anyway, she gave in and consented to their proceeding." (Appellant's Br., p. 19). The discussion in Exhibit 8 concerning an attorney, and particularly, concerning Mr. Poston, begins on page 3 thereof, and it is very clear that for one reason or another the Board of Immigration Appeals had decided that Poston was disqualified from participating in the proceeding (Ex. 8, p. 4; Ex. A, sub ex 1). It was also clear that Appellant understood this. (Ex. 8, p. 4.) Further, if there was any doubt as to what Appellant had been advised by Poston, the evidence was always available to the Appellant, although not likewise available to the Appellee because of the attorney-client privilege. Indeed Poston himself was present in Court during the hearing and before Appellant had rested. (R. 58.) An examination of Ex. 8, pp. 6-7 will show that the Special Inquiry Officer was in the process of determining how long a time Appellant would need to secure another attorney when she volunteered the statement, "I'm ready to go ahead with the hearing if you want to." (Ex. 8, p. 7.) Thereafter the only possible pressure applied to Appellant was to make a decision—did she or did she not want to proceed without counsel. (Ex. 8, pp. 7-8.) She did consent to go on without counsel. (Ex. 8, p. 8).

Further, at the conclusion of the first day of hearing, additional charges were lodged (Ex. 8, p. 14), and Appellant stated she wished to get *an attorney* and have time to meet the charges. (Ex. 8, p. 14.)

At the continued hearing (Ex. 8, pp. 16-19) Appellant stated first she had no attorney so far (Ex. 8, p. 16.) Then, that she was waiting for a communication from Poston. (Ex. 8, p. 16.) When queried whether she would like to talk with Poston on the telephone (Ex. 8, p. 17), it was also developed that she had called Poston after the first day of hearing and had as of that time received no answer. (Ex. 8, pp. 17-18.) She was allowed to call him again. (Ex. 8, p. 18.) She then again consented to proceed without counsel. (Ex. 8, p. 18.) Appellant contends that this amounts to no more than a waiver of her statutory privilege to counsel of her own choice at her own expense.

Further, Appellant's deportability is clear. In this case no prejudice resulted from lack of counsel. There was nothing counsel could do nor anything witness could supply which would change the result of the proceeding. *Sumio Madokoro v. DelGuercio,* 9 Cir. 1947, 100 F.(2d) 164, 167; *U.S. v. Heikkinen,* 240 F.(2d) 94, 98, cert. granted, 353 U.S. 935, 77 S.Ct. 813, 1 L.Ed. (2d) 758, but not on grounds of lack of representation by counsel at the deportation hearing, 25 L.W. 3305. See also *Melha v. Shaughnessy,* 2 Cir. 1955, 219 F.(2d) 600, *In the Matter of the Application of Pietro Biagio Raimonde for a Writ of Habeas Corpus* (USDC ND Cal., S.Div.) Decided Nov. 5, 1954, Civil 34114 (unreported). "Failure to have counsel, if error, like other errors, may not be prejudicial." *Madokoro v. DelGuercio, supra,* p. 167.

(B) Incomplete record.

The record of the deportation hearing contains "off the record discussions." This procedure is allowed (8 C.F.R. 242.15), consequently, off the record discussions do not make incomplete records. For the substance of the off the record discussions see the testimony of George L. Elms (R. 85-100). Further, the Immigration and Nationality Act expressly supersedes the hearing provisions of the Administrative Procedures Act—*Marcello v. Bonds,* 349 U.S. 302, 305-311.

CONCLUSION.

The Appellant had a fair hearing in a case of clear deportability. The convictions of the crimes for which she was ordered deported show that they are crimes involving moral turpitude.

Dated, Honolulu, T.H.,
March 11, 1958.

Respectfully submitted,

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